

1 subsidized regulatory scheme that had been in place
2 since the 1970's.

3 The other was for telecom companies.
4 There's a whole other debate about what is and what is
5 not telecom. There's at least an argument that much of
6 what they do is in fact telecom. That's for another
7 forum and another day.

8 The telecom rate yields in most instances
9 a higher per year charge.

10 We just think that faithfully as a matter
11 of just compensation that does not make sense.

12 If we're talking about just compensation,
13 and we know that we are because everyone agrees there's
14 a taking. We don't understand how the same one-foot of
15 pole space can yield two different prices based on
16 whose taking it.

17 So, one of our threshold arguments in the
18 APCO v. FCC Right dispute, there cannot be two prices
19 for the same piece of property.

20 While we believe that the telecom rate,
21 because it relies on embedded or historical cost is
22 still faulty it is at least better than the cable rate

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1 because it fully allocates the unusable space.

2 Poles, let's just take an average pole,
3 forty-feet long, just looks like a big bare pole.
4 Sometimes it has cretine on it, some other
5 preservative. It gets sunk in the ground usually about
6 six-feet. There are natural - national electric safety
7 code regulations, which tell you how much space there
8 has to be between grade or the ground level and the
9 bottom wire.

10 Then there are regulations about how much
11 space there has to be between any live electrical wires
12 and anything else.

13 So what may look like a wide open pole when
14 you're talking about the minimum clearance between
15 ground and the bottom wire, and the minimum clearance
16 between electrical facilities and anything else, you're
17 really talking about a limited amount of space.

18 One of the parts of the APCO v. FCC
19 decision that we believe is most mysterious and that we
20 would like Your Honor to consider, is that Judge
21 Tjoflat relied at least in part on a hypothetical one
22 million foot pole.

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1 He accurately noted in his opinion that
2 Gulf Power had not alleged in the record below that its
3 network of poles was crowded.

4 That's because the whole notion of crowding
5 were the requirement of having a full pole before you
6 can receive constitutional just compensation - it was
7 never there until APCO v. FCC.

8 So one thing that we need to put in the
9 proper time perspective is this opinion. This is and
10 I think they would agree, the first instance in which
11 any judicial body has said, before you are entitled to
12 something more than the regulated rate, you must first
13 demonstrate that your property is rivalrous. That it's
14 full.

15 CHIEF ADMINISTRATIVE JUDGE SIPPEL: That
16 doesn't really concern me so much. It's what's in the
17 hearing designation.

18 MR. LANGLEY: Well, I think that that does
19 concern you, Your Honor, because one of the things that
20 we will agree with that Mr. Seiver said is that we have
21 to demonstrate, we don't like it, we don't agree with
22 it, we think it's bad as a matter of law and policy.

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1 We agree that we have to make a showing of either a
2 crowded pole or a full pole.

3 Whatever that means to entitle us to
4 something higher than the cable rate.

5 CHIEF ADMINISTRATIVE JUDGE SIPPEL: All
6 right, well, that's a - maybe that's a mini-concession.

7 MR. LANGLEY: It's a concession.

8 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Okay.
9 Go ahead, I'm listening.

10 MR. LANGLEY: With respect to the issue of
11 the cable rate allowing more than marginal cost, I'm
12 willing to give another mini-concession and that is
13 that the cable rate does give something, ever so
14 slightly above marginal cost.

15 Now, whether it's much more than marginal
16 cost, as Mr. Seiver says, we don't agree with that.

17 We will concede that the cable rate
18 provides for more than marginal cost.

19 However, we read the APCO v. FCC --

20 CHIEF ADMINISTRATIVE JUDGE SIPPEL: I got
21 a definition here someplace that it's plus annual
22 payments which equal a share of operating costs

1 attributable to the licensee shares of usable space.

2 I mean, that might be more than just a
3 little bit. Isn't it? If you, I mean maybe it's a
4 little bit for one pole, but if you're talking about
5 140,000 poles and you multiply that - that might be a
6 piece of change.

7 MR. LANGLEY: Well, I'm not going to deny
8 that the aggregate number of all the rental paid is an
9 impressive number. I mean a million dollars is still
10 a lot to me. When we're talking about spreading it
11 over the entire pole network, we don't think that is
12 significantly more than marginal cost.

13 The issue that I wanted to address is what
14 APCO v. FCC requires in that regard.

15 We read that opinion to say, essentially,
16 that the cable rate is the floor. Not that marginal
17 cost is the floor, but the cable rate is the floor.

18 Now, I said earlier that the APCO v. FCC
19 opinion is nuance. This is one of those nuances.

20 At some places, they talk about the floor
21 being marginal cost. In other places, they talk about
22 the floor being the cable rate.

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1 So, one of the things that the evidence
2 needs to inform and that Your Honor will be called upon
3 to decide is, which is what APCO v. FCC meant?

4 We would urge that the cable rate is the
5 floor. Our problem with the cable rate has been from
6 the inception and remains today that it relies on
7 historical rather than current replacement costs and
8 that it does not fully allocate the pole.

9 Just compensation law is clear that
10 historical costs are a disfavored measure of just
11 compensation. That's because what something costs back
12 in 1980, doesn't necessarily have anything to do with
13 what its value is today. Particularly when you're
14 talking about a depreciating asset.

15 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Now
16 they're talking about current market value, right?
17 Isn't that what they look at?

18 Well, take my house. They're going to look
19 around and see what the market value of the house is,
20 in some way, shape or form. Right, before - then pay
21 me.

22 MR. LANGLEY: Well, they would, and to be

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1 fair to the complainants, they would say there is no
2 market. So --

3 CHIEF ADMINISTRATIVE JUDGE SIPPEL: I was
4 going to ask that question myself. How do you have a
5 market for pole space, when only one company owns the
6 poles?

7 MR. LANGLEY: The market that we're talking
8 about is the buyers market. I guess the market they're
9 talking about is the sellers market.

10 So, when we talk about markets, we're
11 actually talking about two different markets.

12 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Well,
13 usually your product is bought and sold within one
14 market, right?

15 MR. LANGLEY: Well, it is. We believe that
16 there are other buyers. Other willing buyers of the
17 space.

18 In fact, we have people on our poles who
19 are paying more \$40.00.

20 CHIEF ADMINISTRATIVE JUDGE SIPPEL: That
21 puts you in the best of all possible worlds. Because
22 you're the only seller and you've got multiple buyers.

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1 MR. LANGLEY: That is true. We do not think
2 that our poles are an essential facility. In fact,
3 creative cable companies have gone out and found other
4 means of transmitting their signals.

5 I don't think that that's really the issue
6 that we're here about.

7 Going back to your example of the current
8 market value of your house, say there had not been a
9 sale in your neighborhood in three years and there was
10 no reliable information upon which to derive the market
11 value.

12 One of the things that we think, a Court
13 would look to, if the government came and took property
14 for some reason, if there was not a reliable market out
15 there - is what it would cost to rebuild that house
16 today.

17 Not what it cost you and your family to
18 build it back in 1985. So, in our proposed alternative
19 cost methodologies, we have urged that current
20 replacement costs be used.

21 With respect to a time frame during which -
22 -

1 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Now,
2 wait a minute, you want to charge replacement costs,
3 the space that's used on your poles. So - and you want
4 that to be the standard across the board?

5 Replacement costs?

6 MR. LANGLEY: Well, we want the standard to
7 be fair market value. We think there's a market out
8 there. If --

9 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Well,
10 there is no market - let's be honest about that.

11 My point is, is that there - I'm going to
12 go back to this again. We've got a formula. The
13 formula is set by the Commission with respect to all
14 poles that are existing in the United States with the
15 exception of those which can be proven to be at full
16 capacity.

17 That's the state of the law, right now
18 today.

19 I'm saying is - what's the measure that
20 you're using with respect to any pole that doesn't meet
21 the full - I understand there's a footnote to that
22 question - because you said well that's were here -

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1 we're litigating as to what that definition of that
2 might be.

3 Assuming that it means - the plain meaning
4 is that it's a full - fully utilized pole in present
5 terms. Not in terms of future use, but in present
6 terms. You can demonstrate that as to all - as to
7 specific number of poles.

8 What is it that you would want to charge
9 with the ones, the poles, that you can't demonstrate
10 for?

11 It would be something - and forget about
12 market value. It's going to be something. It has to
13 be based on something. That something to me would seem
14 to me, to be, would be the formula.

15 MR. LANGLEY: Well, we think replacement
16 costs. A current replacement cost formula. We say
17 that also recognizing that the 11th Circuit has spoken
18 and they've said that you're only entitled to something
19 more than the cable rate if you can meet these
20 circumstances.

21 So, if say we have - say there are 200,000
22 poles on which complainants are attached and say we

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1 prove that only 30,000 of those poles are full for one
2 reason or another. That would mean that the other
3 170,000 for better or worse are probably going to stay
4 with the cable rate.

5 We don't agree with that result but we
6 believe that's what APCO v. FCC says.

7 CHIEF ADMINISTRATIVE JUDGE SIPPEL: You'd
8 be willing to do that though, without - we wouldn't
9 have to send the Sheriff out to enforce that. I mean
10 if that were a rule, you would do it?

11 MR. LANGLEY: Charge that rate?

12 CHIEF ADMINISTRATIVE JUDGE SIPPEL: On the
13 basis of the law today, as it stands today.

14 MR. LANGLEY: That's the only rate they pay,
15 so as a practical matter it wouldn't matter.

16 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Okay,
17 okay. Well, that's not what I'm hearing but.

18 I'm hearing that they're being charged at
19 a rate of something like \$38.00 a pole --

20 MR. LANGLEY: Well, they're not. They were
21 charge \$38.06 per pole in 2000, which is what led them
22 to filing their pole attachment complaint.

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1 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Oh, I
2 see.

3 MR. LANGLEY: Right, right.

4 CHIEF ADMINISTRATIVE JUDGE SIPPEL: I'm
5 sorry. That's been corrected.

6 MR. LANGLEY: Yes. That's been corrected.
7 That is correct. I mean are we still billing at the
8 old rate or are we sending out duplicate invoices?

9 MR. PETERSON: I can clarify, Ralph
10 Peterson from Gulf Power Company.

11 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Yes, go
12 ahead Mr. Peterson.

13 MR. PETERSON: Of course, back when we
14 started all of the billing and everything else, after
15 the decision - the first Gulf Power decision where it
16 said just compensations are taking.

17 We were billed at just compensation because
18 we understood the ruling. At that time, I mean if you
19 have - if you, under the Act, if a cable company comes
20 in and asks to be on there, we have to put them on
21 there. That was a taking.

22 Therefore, we started charging just

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1 compensation. What we did we sent out bills for the
2 \$38.00 per pole based on that decision.

3 Years go by, we now have a new decision
4 that modifies how you make that determination about
5 just compensation.

6 What we've been doing is that we still have
7 in the pole attachment agreements or the charges,
8 putting out the charges at the just compensation rate,
9 because we're still in this litigation as to what is or
10 what is not being charged.

11 We have an agreement with the companies,
12 that in actuality what they've paying us over the
13 years, has been the cable rate. Continued on the cable
14 rate at that point in time.

15 Then, once we get this litigation resolved,
16 we'll true up - whatever the situation is.

17 So they've ask - what they're being charged
18 on their bill says, just compensation rate. What
19 they're paying and where we're accepting has been the
20 cable rate over the years, with the idea we'll true up
21 after these proceeding are over.

22 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Is that

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1 with respect to all poles --

2 MR. PETERSON: At this time that's with all
3 poles. So all they have been paying for all these
4 poles for all these years has been the cable rate.

5 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Okay.
6 Now, well, I - are you basically finished now? I mean
7 --

8 MR. LANGLEY: Unless Your Honor had any
9 further questions.

10 CHIEF ADMINISTRATIVE JUDGE SIPPEL: No,
11 well let me see, I want to hear from the - see if the
12 Bureau has anything they want to add to this.

13 You all set it for hearing. Do you --

14 MS. GRIFFIN: No, Your Honor, I think Mr.
15 Langley's statement that the APCO decision - Alabama
16 Power decision is nuance is probably even an
17 understatement.

18 We think that that raises - the decision
19 raises some significant issues that the Commission
20 hasn't yet spoken on.

21 The parties have identified them for you
22 here today.

1 When is a pole full? I think that
2 involves, at least to some extent, an analysis of the
3 intersection between the Alabama Power decision and the
4 Southern Company's decision that another 11th Circuit
5 decision that the parties talked about in their papers.

6 How the 11th Circuit's language in that
7 paragraph that we cited in the HDO about compensation
8 above marginal costs, ducktails with a statement later
9 in the paragraph that the cable rate provides for much
10 more than marginal cost.

11 I'm somewhat unclear to what that means.
12 The Commission hasn't yet spoken since those - the 11th
13 Circuit decision has come down so --

14 It's not particularly illuminating, but I
15 don't - we don't have a set view except to note that
16 the decision does raise some of these issues that the
17 parties have been talking about here.

18 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Well,
19 does the Bureau - I mean in terms of evidence, does the
20 Bureau think that it's unreasonable to have Gulf Power
21 come forward and point to each and every pole that they
22 contend is - and they not only contend but that they

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1 can show is being fully utilized.

2 I mean is there a concept that the Bureau
3 works with that might be able to - at least within some
4 kind of a framework, identify what fully utilized
5 means?

6 MS. GRIFFIN: There's not anything that -
7 we haven't handled a case that has gone into this
8 aspect of things since the Alabama Power case.

9 I don't know what the right answer is other
10 than to note that the decision does say with a regard
11 to each pole, which at least to me, suggests
12 that per pole showing. Again, the Commissioner and the
13 Bureau as a whole hasn't spoken on to that issue.

14 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Do you
15 intend to take a position on this at some point or just
16 - that's why this case is here? Is that pretty much
17 the answer?

18 MS. GRIFFIN: That's in large part why the
19 case is here. I mean, we're happy to answer any
20 questions that you have but it would just be speaking
21 on behalf of the Bureau and since there hasn't been any
22 guidance yet from the Commission, and maybe those are

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1 issues to be certified to the Commission depending on
2 what Your Honor wants to do.

3 CHIEF ADMINISTRATIVE JUDGE SIPPEL: You'd
4 certify that question to the Commission? Certify the
5 question to the Commission as what does the phrase
6 fully utilized pole mean?"

7 MS. GRIFFIN: Yes, I mean that one question
8 and also the question perhaps, and again, obviously
9 that's for Your Honor to decide, the question about
10 what the 11th Circuit - what the Commission views the
11 11th Circuit as meaning with respect to its statements
12 about seeking compensation above marginal cost and
13 simultaneously, noting the cable rate provides much
14 more than marginal cost - more than marginal cost.

15 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Well,
16 sitting here today, I wouldn't intend to do that. I
17 think before the question goes up to the Commission, in
18 light of the fact that it's been set down for hearing
19 on substantial questions that the Commission get a full
20 record before they have to wrestle with that. That
21 would be my approach on this.

22 It certainly doesn't make any sense to put

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1 them in the position of doing what they already set -
2 told me to do.

3 Okay, I'm prepared to proceed forward.

4 Do you want to say anything more - just
5 make it brief?

6 MR. SEIVER: I'm sorry, Your Honor; I just
7 wanted to - I'll try and be very brief.

8 On the issue Your Honor, about whether or
9 not the cable rate provides more than marginal cost, I
10 don't think if you go through the APCO decision and we
11 have it quoted a couple of different place.

12 It says, this legal principle together with
13 the fact that much more than marginal cost is paid
14 under the cable rate. Where it the Commission also -
15 I mean the Court also says again on another page, the
16 cable rate (which provides for a much more than
17 marginal cost).

18 I don't understand how anybody can say that
19 when it did say before you're entitled to more than
20 marginal cost you've to make this showing.

21 That somehow or other, that that means the
22 cable rate is the floor. It just - that I can't

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1 follow.

2 The pages in the APCO decision, at 311 Fed.
3 3rd, is running from 1370 on to 1371 which is that
4 parenthetical and then it also appears on page 1369,
5 where they're talking shortly after footnote 21.

6 Secondly, Your Honor, we talked about
7 whether we're paying what the formula says, in addition
8 to make-ready, which is not an element of the formula.
9 The utilities do have the option of taking make-ready,
10 whatever that might be - the charges for replacing the
11 poles, and putting that into the formula and then we
12 pay rent on that. Or they get their make-ready up
13 front and then we have to back out those costs that
14 we've already paid them for from the formula so we
15 don't pay them twice in rent.

16 The formula is about \$4.61. Yet, if you go
17 back to the Order that orders us to pay, we're paying
18 in the neighborhood of \$5.00 to \$6.20.

19 So, we're already paying more - not only
20 make-ready - we're paying more than the formula would
21 say for us to pay them.

22 Now, one of the things about not being

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1 alleged in the record below was the same for Gulf Power
2 as with APCO. The never alleged that, well we should
3 get \$38.00 because the pole is full.

4 There was never any argument about that.
5 It was only after the APCO decision that then Gulf
6 Power said, well, okay we want the chance to say that
7 our poles are poles are full. Even though they were
8 reserving on it because there was a challenge to that
9 11th Circuit decision by Alabama Power they sought cert.
10 in the Supreme Court, which was denied.

11 As far as Mr. Langley's comments about the
12 subsidized regulatory scheme for the cable rate. I
13 think Your Honor had already pointed out that there are
14 costs, fully allocated costs. Everything is given back
15 to them.

16 As far as unusable space, the cable formula
17 does use the accounts that take the entire cost of a
18 pole.

19 That means not just the usable part of the
20 pole, but the unusable part of the pole. The entire
21 length of the pole is an allocated cost in that
22 formula.

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1 So, we do pay for unusable space. It's a
2 different way than under the telecom rate but the 11th
3 Circuit also rejected that. They said the fact that
4 there's a telecom rate and cable rate is irrelevant.
5 So, we already have that issue decided.

6 I'm working back towards where Mr. Langley
7 was starting.

8 On the operational issues, we do have a
9 little bit of a dispute. It was resolved.

10 When he said, just so Your Honor will
11 understand, that we don't tell them what poles we go
12 on. Very often, there's a lot of paperwork, a lot of
13 work out in the field. Poles are being changed out.
14 Other people are going in. People are doing
15 developments.

16 We might apply for an entire string of
17 poles, along a particular road. That means we have to
18 go out and get those pole numbers. You know, H43632,
19 and maybe we missed one. Maybe that permit got lost.
20 They find out that it's not permitted and we haven't
21 been charged for it. We pay a penalty.

22 There's not like sneaking around in the

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1 night. Saying hey, there's some space there and we put
2 it up.

3 We're bound by the Natural Electric Safety
4 Code. We just can't go out and do that without paying
5 make-ready for the pole.

6 As far as this proceeding having no meaning
7 and this is where Mr. Langley started. I just want to
8 make sure that our position is clear.

9 I do think that this was a difficult issue.
10 I think as Ms. Griffin indicated this was something
11 they deferred to Your Honor to make a decision on.
12 Because it is an important issue. Especially for us to
13 have resolved what is the rate that a cable operator is
14 going to pay to be on the pole?

15 What is that going to be?

16 Now, the fact that we already pay more than
17 marginal costs, you could say, well, that's all that
18 Tjoflat said. Tjoflat said more than marginal costs
19 are already being paid. Then why do you make your big
20 stink about it?

21 Why didn't say they could get something
22 more than marginal costs if we know they're already

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1 getting it.

2 It just goes in line with what the Gulf
3 Power 1 decision said that we don't know. We don't
4 know if that amount more than marginal costs that we're
5 already paying is sufficient. It could be.

6 That's why we wanted to argue that that
7 rate, that cable rate, does already pay more than
8 marginal costs. That's enough. They don't deserve
9 anything more.

10 I don't think the Commission or the Bureau
11 was ready to make that ruling.

12 Now, as far as what's going to happen down
13 the road, as far expansion of capacity, we don't have
14 the right to say - we like this particular street here.
15 You don't have a line of poles on it Gulf Power -
16 you've got to build on that and you know what then
17 you've got to rent it us. It, we're not talking about
18 that.

19 We're talking about the routine change outs
20 of poles. If there's a car accident, if there's a
21 development, whatever.

22 For even Gulf Power's own needs. They need

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1 to put up streetlights. They need to put up
2 transformers, capacitors, whatever they might need.
3 This is a routine operational issue.

4 Our point is that if a pole is full, we pay
5 for it. Somebody pays for it to be changed out.
6 Changed out, it's not full anymore. Maybe that says in
7 their mind, well then, this case has no meaning.

8 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Well,
9 if you, if they could prove that let's say X number -
10 go back to my hypothetical, that 100 of 1,000 poles are
11 actually fully utilized, it - are your clients
12 prepared, I mean are they acceptable of the fact that
13 there's going to be additional compensation over and
14 above the formula.

15 Are they acceptable to that? Because it
16 seems to me that that's clearly what the 11th Circuit
17 says, and what the Commissioner said.

18 MR. SEIVER: We pay whoever it is that is
19 causing there to be a lack of capacity pays for the
20 pole change out.

21 We already pay that, to put in the taller
22 pole. To say that then, well, we're not going to put

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1 in a taller pole but just up your rent, based on as if
2 you had paid for a taller pole just doesn't seem to
3 make any sense.

4 I understand that, you know what Judge
5 Tjoflat said, but I don't see and we have argued that
6 since we already pay more, whether the pole is full or
7 the pole is changed out, the cable formula takes care
8 of them. More than takes care of them.

9 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Well,
10 this isn't going any further. Did you want to make any
11 brief reply to that before I move on?

12 MR. LANGLEY: Not unless you wanted me to.

13 CHIEF ADMINISTRATIVE JUDGE SIPPEL: No, I
14 mean I think I understand what's going on here.

15 There's a lot of evidence that's going to
16 have to be considered.

17 Now, I know that they use that - I've been
18 hearing this word nuance all morning and I didn't know
19 if in Washington people supposed to do that anymore, I
20 suppose - but I'll do the best I can.

21 Okay, here's what - why don't I go right
22 into the - there's a lot - there's a lot of things that

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